Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1987

JOHN YIAMOUYIANNIS, Ph.D.,

Petitioner,

—v.—

CONSUMERS UNION OF UNITED STATES, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, Oakes, J., dated March 19, 1980, affirming the decision of the District Court, is not yet officially reported; it is set out at pp. A-1 to A-19 of the Appendix to the Petition for a Writ of Certiorari. The opinion of the United States District Court for the Southern District of New York, Owen, J., dated May 30, 1979, granting summary judgment to the defendant in that court, is also not yet officially reported, and appears at pp. A-20 to A-23 of the Appendix to the Petition.

QUESTION PRESENTED

Was the court below correct in affirming the grant of summary judgment in favor of a media defendant in a libel case, against a conceded public-figure plaintiff, where the record plainly demonstrated that plaintiff could make no showing whatever of constitutional "actual malice", and where the defendant's efforts to insure the accuracy of its article were so great as to move the Court of Appeals to characterize them as "the very highest order of responsible journalism"?

STATEMENT OF THE CASE

This is a diversity libel action, brought against Consumers Union of United States, Inc. (hereinafter, "respondent", "Consumers Union", or "CU"), the well-known not-for-profit independent testing organization, which for more than forty years has published the monthly magazine, CONSUMER REPORTS.[1]

The petitioner, John Yiamouyiannis, alleges that he was libelled in a two-part series of articles appearing in the July and August 1978 issues of CONSUMER REPORTS, entitled *Fluoridation: The Cancer Scare,* and *The Attack on Fluoridation—Six Ways to Mislead the Public.*

The facts underlying the case are carefully, succinctly, and accurately set forth in the opinion of the court below, as follows:

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1 At present, CU has approximately two hundred thousand individual members, and the magazine CONSUMER REPORTS enjoys a circulation of approximately 2.3 million. Over the years, CU has earned a widely respected and well-deserved reputation for accuracy and integrity, a fact which has been recognized by the courts. See *Consumers Union of United States, Inc. v. Theodore Hamm Brewing Co., Inc.*, 314 F.Supp. 697, at 698, 700 (D. Conn. 1970).

"Dr. Yiamouyiannis is and for many years has been an active opponent of the fluoridation of public water supplies, and since 1974 has been a paid employee of the National Health Federation, which is an organization that for over twenty years has been actively opposed to fluoridation. Dr. Yiamouyiannis has also authored over fifteen articles on fluoride and is a coeditor of a quarterly, *Fluoride,* published by the International Society for Fluoride Research. He appeared actively before the Subcommittee on Intergovernmental Relations and Human Resources of The House Committee on Governmental Operations on September 21 and October 12, 1977,[1] both to state his own views on the dangers of fluoridation and to refute the arguments of the National Cancer Institute (NCI) and various other organizations that have taken the position that fluoridation is not harmful and helps significantly in the prevention of dental caries. These other organizations include the National Academy of Sciences, the National Heart, Lung and Blood Institute, the American Medical Association, the American Cancer Society, and the American Dental Association.

"The *Consumer Reports* article was written by Joseph R. Botta, a senior editor on the magazine staff. Botta is a professional journalist who has been a scientific writer for fifteen years, having worked

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[1] *See The National Cancer Program (Part 2.—Fluoridation of Public Drinking Water): Hearings Before the Subcomm. on Intergovernmental Relations and Human Resources of the House Comm. on Governmental Operations*, 95th Cong., 1st Sess. (1977) (hereinafter "Hearings Record").

[Footnote by the court].

for the Shell Oil Company from 1959 to 1971, and for Consumers Union in the environmental and health areas since 1972. Botta became interested in the topic of the campaign against fluoridation after having read an article in the *New England Journal of Medicine*—Walsh, *Fluoride, Slow Diffusion of a Proved Preventive Measure,* 296 New England J. Med. 1118 (1977)—and an article in a leading British medical journal—Doll & Kinlen, *Fluoridation of Water and Cancer Mortality in the USA,* Lancet, June 18, 1977, at 1300. But it was only when the House Subcommittee held hearings on the effects of fluoridation and its possible link to cancer that the decision to write and publish an article on the subject was made. Botta obtained a copy of the transcript of the hearings before the House Subcommittee and reviewed some standard medical reference works, which led him to the World Health Organization's 1970 report, *Fluorides and Human Health,* and to other studies on fluoridation. His conclusion from these studies, as stated in his affidavit, was that there was '*no* acceptable scientific evidence of any kind that the practice of fluoridating drinking water at appropriate levels had any deleterious effects whatever' (emphasis in original).

"In the course of Botta's research he also made reference to studies by the British Royal College of Physicians, by the Royal Statistical Society and by investigators at Oxford University. The Subcommittee hearings record contained a schedule, set out in the margin, of studies between 1954 and 1977 showing no association between cancer incidence or

deaths and fluoride.[2] Accordingly, Botta was led by 'the overwhelming weight of scientific evidence' to have seriou doubts as to the credibility to be accorded to Dr. Yiamouyiannis's work—two unpublished versions of which, dating from July and December of 1975, were criticized by the National Cancer Institute. Hearings Record at 98-101, 110-113, 203-208. A more recent version of appellant's work, presented in England in May of 1977 and published in the magazine *Fluoride,* was incorporated in the hearings record. *Id.* at 18-40.

"A brief review of the *Consumer Reports* articles is as follows: The first article, published in July 1978, relates how Dr. Yiamouyiannis's colleague, Dean Burk, Ph.D., an American biochemist, helped to kill a proposal before the Dutch Parliament to fluoridate water supplies, by virtue of a television interview in Holland in 1976 in which he told the audience that 'fluoridation is a form of public mass murder.' The article discusses the defeat in Los Angeles and hundreds of other American communities of fluoridation proposals, and mentions the House Subcommittee hearings. What emerged from the testimony, the article says, was 'an unmistakable sense that millions of Americans are being grossly misled' about fluoridation. The article then describes the initial investigation in the 1930s and 1940s resulting in the conclusion that fluoridation helps prevent dental cavities, and also refers to the opposition that gradually developed. This opposi-

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[2] [The court's footnote 2, filling nearly a full page of the Appendix, sets out these studies in tabular form.]

tion is now led by the National Health Federation, whose roots, the article says, 'run deep into the soil of medical quackery.'[3] The article goes on to say that in 1974, the NHF decided to 'break the back' of fluoridation efforts and 'hired Dr. Yiamouyiannis to do the job.' It says that he was successful in influencing the debate in 1974 in Los Angeles, and that his July 1975 study with Dr. Burk (who is said to be a leading advocate of laetrile along with the NHF), 'failed [according to the NCI] to take into account widely recognized risk factors known to affect the death rate.' It adds that a later December 1975 study was even more 'amateurish,' according to an NCI official, and ignored 'the most fundamental factors involved in cancer mortality rates—age, sex and race.' The article reports that Drs. Burk and Yiamouyiannis were successful in Holland, but unsuccessful in England, and points out that 'independent investigations by seven of the leading medical and scientific organizations in the English-speaking world have unanimously refuted the National Health Federation's cancer claims.' *See* note 2 *supra.*

"The second article, published one month later, refers to other claims that fluoridation causes harm,

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[3] According to the article in 1963 the FDA released a report on the NHF that said in part:

> The stated purpose of the federation is to promote "freedom of choice" in health matters. This record shows that what this frequently means is freedom to promote medical nostrums and devices which violate the law. From its inception, the federation has been a front for promoters of unproved remedies, eccentric theories and quackery.

[Footnote by the court].

yet nowhere mentions Dr. Yiamouyiannis, Dr. Burk, or the National Health Federation in refuting theories that fluoride is a poison, causes birth defects, is mutagenic, causes allergic reactions, causes cancer in animals, and contributes to heart disease. However, the article does state that 'every type of misrepresentation known to Disraeli' has 'been used to attack fluoridation,' referring to the 'misleading information' that appears regularly in a paper called the *National Fluoridation News*, and also states that the 'entire gamut of hokum' has recently been published in an issue of the *Cancer Control Journal*, a pro-laetrile magazine based in Los Angeles. The article concludes by saying that the 'simple truth is that there is no "scientific controversy" over the safety of fluoridation,' and that the 'survival of this fake controversy represents, in CU's opinion, one of the major triumphs of quackery over science in our generation.'

"Appellant's unverified complaint in four counts, each seeking two million dollars in damages, complains of defamation mainly by innuendo. In essence, appellant reads the articles as saying that his work is 'grossly and irresponsibly misleading' the American people; that fluoridation is absolutely and unquestionably safe; that appellant sold his scientific integrity and objectivity to contrive a deliberately false case against fluoridation; that appellant's work is incompetent 'claptrap' and overlooks fundamental risk factors that elementary principles require; that appellant and Dr. Burk have insisted both in America and Europe that fluoridation is mass murder; and that they are men of no credibility or

honor. All of this is said to be false and to have been published with the purpose of destroying the appellant's reputation with 'willful or reckless disregard of the facts.'

"In moving for a summary judgment, appellee submitted Mr. Botta's affidavit as well as the House Subcommittee hearings. The affidavit set forth Botta's account of research, as above stated, which was undisputed, as well as his investigation of the background and qualifications of Drs. Yiamouyiannis and Burk and his [Botta's] consultants before publication, also undisputed. These consultations were with (1) the Consumers Union library staff, to determine the reliability of supporting references, (2) the technical department, (3) an in-house medical consultant, (4) an outside medical advisor, (5) a dental consultant, (6) a Ph.D. with experience in epidemiology and the safety of water supplies, (7) a psychiatrist who in connection with health fraud had investigated and written about the National Health Federation, (8) the head of the Environmental Studies Section of the Environmental Epidemiology Branch of NCI, and (9) a professor of biochemistry of the University of Minnesota, all of whom, after some suggested changes that were incorporated into the final version of the article, agreed that it was reliable and accurate.

"Dr. Yiamouyiannis's counter-affidavit takes particular issue with the statement in the first article that he and Dr. Burk had ignored the most fundamental risk factors—age, sex and race—and says that this related only to their 1975 preliminary studies, whereas their later works did take these into

account.[4] The counter-affidavit also says that data and procedures of NCI were shown in Congress to be flawed by critical errors and omissions and that it was this data that was copied in England, thereby showing 'the political intrigue of the current cover-up of the fluoridation cancer link.'[5] He goes on to say that the seven independent investigations alluded to in the Botta article did not address the most recent and comprehensive study by Dr. Burk and the affiant appearing in *Fluoride* magazine, so that his work had not been 'refuted.'[6] Other issues with regard to the scientific viability of the fluoridation controversy are detailed."

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[4] [The court's Footnote 4 contains a long excerpt from pp. 203-204 of the Hearings Record, setting forth testimony by the National Cancer Institute showing the failure of plaintiff's later works in fact to control properly for these demographic factors.]

[5] [Footnote 5 by the court sets forth testimony from p. 208 of the Hearings Record, showing the utter insignificance of the error involved.]

[6] *But see* notes 4 and 5 *supra*.

[Footnote by the court].

On these facts, the District Court found that there was insufficient evidence from which a jury could find "actual malice", even if the plaintiff could show falsity, and accordingly granted summary judgment; on appeal, the United States Court of Appeals for the Second Circuit affirmed.

The decisions below were eminently correct, and should not be disturbed by this Court. The petition should be denied.

REASONS WHY THE WRIT SHOULD BE DENIED

There can be no question that, on the record before them, the courts below were plainly correct in granting and affirming summary judgment in the respondent's favor. No more apt or appropriate case for summary judgment can be imagined, nor one less worthy of further waste of judicial time and effort.

1. The Courts Below Were Correct.

It is plain that the courts below were correct in granting and affirming summary judgment herein. The plaintiff concedes himself to be a public figure, as indeed he must. He has actively, voluntarily and aggressively thrust himself into the fluoridation issue, appearing before Congressional committees; seeking and obtaining extensive press and broadcast coverage; writing and speaking widely; and compiling what he asserts is a "national and international reputation" in the field. Accordingly, he falls squarely into that class of persons who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 345 (1974).

As a public figure, the plaintiff in order to prevail must show, not only the falsity of statements concerning him, but also that those false statements were made knowingly or with reckless disregard of the truth. *St. Amant v. Thompson,* 390 U.S. 727 (1968); *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964). On the record before the courts below, it was manifest that he could and would be able to make no such showing, and summary judgment was accordingly proper.

In support of its motion for summary judgment, Consumers Union made an overwhelming showing of the painstaking efforts it had made to insure accuracy in its article; the 37-page affidavit of Joseph R. Botta, particularly, detailed the sources (usually multiple) for every single statement of fact of which plaintiff complained, and the extensive and careful checking and rechecking of every aspect of the articles.

In response to this overwhelming showing, petitioner primarily argued below, as he does here, that "malice" could be inferred, because of the alleged great disparity between the articles, and the sources on which they relied, principally the House Subcommittee Hearing Record. His contention fails for two reasons, however: First, even if he were factually correct as to the alleged disparities, malice may not be inferred from falsity alone. *New York Times Co. v. Sullivan, supra,* 376 U.S. at 272-73. Second, as is apparent from the careful analysis by the Court of Appeals, the disparity which petitioner claims to see between articles and source, does not even exist; there is abundant evidence in the hearing record to support respondent's stated opinion and conclusion that Dr. Yiamouyiannis' work, if not knowingly false, was bungled, incompetent, and amateurish. (See, e.g., A-16–A-18.)

Except for these baseless assertions, plaintiff presented below and presents here nothing which even tangentially suggests that he can show falsity, much less malice, or that summary judgment should have been denied. Petitioner claims (Petition, p. 8, n.5) that malice may be inferred, from respondent's continued licensing of republication of the articles, after respondent had been supplied with a copy of a brief prepared by plaintiff's

counsel in an anti-fluoridation case in Allegheny County, Pennsylvania. As the court below correctly observed, however (A-19), that brief itself relies upon petitioner's own discredited work, and thus can hardly have convinced respondent of the falsity of its criticisms of that work; moreover, the material in question was only supplied to Consumers Union after publication of the original articles, and thus can hardly show anything about CU's state of mind when publishing them. (The petitioner does not base any separate cause of action on the republication.)

The petitioner also claims that he is entitled to a trial, because he would there "attempt to impeach the testimony of the journalist on cross-examination, with possible aid of discovery, and by testimony of our witness [sic]—not only of the Plaintiff . . . but of experts as set forth in footnote 6 hereinabove." (Petition, p. 15)

None of this, plainly, is or should be sufficient to avert summary judgment, in a libel case or any other kind of case. The plaintiff cannot now invoke the "possible aid of discovery", for, as the court below noted (A-15), the petitioner has already waived it, suggesting in neither the District Court nor the Court of Appeals that he needed any such procedures in order to prove his case.

Nor has the plaintiff suggested any possible testimony by himself or his "experts", sufficient to avert summary judgment. Both his own affidavit, and those of his so-called "experts", Mr. McGrady and Dr. McKinney, were before the courts below, and none contained any evidence of substance in opposition to summary judgment; indeed, the conclusory accusations of the

latter two affidavits (see Petition, p. 8, n.6) hardly rise above the level of simple name-calling, and contain nothing even admissible in evidence. If it is plaintiff's contention, of course, that these "experts" would have had something else to say, the place to show that would have been in the District Court; it is elementary that "[a] party opposing a motion for summary judgment simply cannot make a secret of his evidence until the trial, for in doing so he risks the possibility that there will be no trial." *Donnelly v. Guion*, 467 F.2d 290, 293 (2d Cir. 1972).

Petitioner, then, is left only with the vain hope that he might, at trial, succeed in impeaching or discrediting CU's author, Mr. Botta. Plainly, under long-established precedent, this is not enough.

> "If the most that can be hoped for is the discrediting of defendant's denials at trial, no question of material fact is present. [Citations omitted]. Even if we were to disregard the denials as incredible, plaintiffs would still be required to come forward with evidence which, viewed most favorably to them, would permit an inference of conspiracy. Absent such evidence, there is no issue for trial. 'Summary judgment cannot be defeated by the vague hope that something may turn up at trial.' *Perma Research & Development Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969)." *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co.*, 513 F.2d 102 (2d Cir. 1975).[2]

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2 Petitioner's contrary argument, relying on *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946), is wildly misplaced, for the very court which decided *Arnstein* has since squarely held that "The rule of *Arnstein* . . . is no longer good law," *Beal v. Lindsay*, 468 F.2d 287, 291 (2d

As there was substantial—not to say overwhelming—evidence of the care and conscience with which CU prepared its articles, and there was not an iota of evidence presented by plaintiff, even to suggest falsity, much less malice, the courts below were plainly correct in their grant and affirmance of summary judgment in favor of the defendant.

2. The Importance of This Case Does Not Merit Granting the Writ.

Petitioner appears to argue that the writ should be granted either because the court below misperceived the significance of footnote 9 to Mr. Chief Justice Burger's opinion for the Court in *Hutchinson v. Proxmire*, 443 U.S. 111, 120 (1979), which questioned the "rule" in favor of summary judgment in libel cases, which other courts had been developing; or because some sort of guidance is needed by the lower courts as to the applicability of the *Hutchinson* footnote.

Both arguments are totally misplaced, for it is plain from its opinion that the court below relied on no special "rule", and none is necessary, in affirming the grant of summary judgment herein. All that the court below held in this case, was that upon the application of ordinary summary judgment principles, surely no *less* applicable in defamation cases than in any other, the defendant should prevail—that where the plaintiff is able to present *no* evidence from which a jury could find in favor of the plaintiff, on the central elements of his case, the

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Cir. 1972), ". . . leaving cases like *Arnstein* as mere mementos of law gone by as far as the burden of proof on a motion for summary judgment." 6A MOORE, FEDERAL PRACTICE, ¶ 56.17 [13], at p.56-798 (footnotes omitted).

defendant is entitled to judgment.[3] ". . . [W]e are convinced, as was Judge Owen below, that no reasonable jury could find with convincing clarity on the facts in this record that appellee, or its agents Botta and his editors and consultants, acted with actual malice in the *Sullivan-St. Amant* sense of that much-abused term." (A-16)

For these very reasons, even if the petitioner is correct that the lower courts need "guidance" in the application of *Hutchinson*, this case would be a singularly inappropriate vehicle by which to render such "guidance", unless the meaning of *Hutchinson* is that *no* defamation case, no matter how frivolous, is to be disposed of by summary judgment. Any possible further discussion by this Court of the propriety of summary judgment in a closer case—such as one where the plaintiff has made a strong showing of falsity, or of facts or circumstances known to the defendant which cast doubt on his story, or of sloppy or careless investigation—could only be *dictum* in this case, where the plaintiff has made no such showing. Accordingly, what petitioner in fact seeks from this Court is no more nor less than an advisory opinion, an exercise in which the federal courts do not deign to indulge. *Hall v. Beals*, 396 U.S. 45 (1969).

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3 For the same reason, petitioner is wholly mistaken in his effort to imply the existence of a conflict where none exists, between the decision of the court below, and that of the District of Columbia Court of Appeals in *Nader v. deToledano*, 408 A.2d 31 (Ct.App.D.C. 1979), cert. denied ____ U.S. ____ (1980).

3. This Court Should Not Encourage Petitioner's Abuse of the Courts by Granting the Writ.

Throughout plaintiff's papers in this case, from the complaint itself on to the present, there have appeared repeated indications that plaintiff's true motive in bringing this action, is not the desire to obtain redress for any real or imagined harm to his reputation. It has been apparent throughout, that the real flaw in plaintiff's claim, has been his attempted distortion into a libel claim, of his disagreement with Consumers Union over the alleged dangers of fluoridation, in order to obtain a forum to trumpet his views, and to use the courts to punish Consumers Union for having the temerity to disagree with his position, and the temerity to accept instead the considered findings of every respected authority which has ever investigated the safety of fluoridation.

Indeed, the District Court found clearly that ". . . the suggestion is strong that plaintiff's object in bringing this action is to use this court to discourage the publication of opposing views." (A-23)

In such circumstances, it is clear, the granting of a writ of certiorari in this case would have unfortunate consequences, far beyond the significance of the case itself. The very granting of the writ would serve as encouragement to the plaintiff and the growing number of others like him, who seek to abuse and misuse the courts for all manner of improper purposes, of punishing those with whom they disagree, and obtaining a forum for their views.

Such improper activities should not be encouraged by granting the writ.

CONCLUSION

For all of the reasons set forth herein, the petition for a writ of certiorari should be denied.

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